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No. 00-317

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Jeremiah W. (Jay) Nixon, Attorney General,
State of Missouri, et al.,
Petitioners,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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8 pp

TABLE OF AUTHORITIES

CASES **Page**

EEOC v. Waffle House, Inc.,
193 F.3d 805 (4th Cir. 1999) 2, 4, 5

Ex Parte Young, 209 U.S. 123 (1908) 5

Moses H. Cone Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 3

Northeast Fed. Credit Union v. Neves,
837 F.2d 531 (1st Cir. 1988) 4

Southland Corp. v. Keating, 465 U.S. 1 (1984) 3

State ex rel. Nixon v. Merrill Lynch,
no. E-07/94-12670 4

STATUTES

42 U.S.C. §1983 5

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At the eleventh hour, respondent would have this Court place heavy focus upon *res judicata*. But the case is not about *res judicata*. It is about a federal court's authority to pick and choose a state agency's remedies in an enforcement proceeding, based on state anti-discrimination laws, against a private employer. Respondent's efforts to point to *res judicata* or to diversity – two among the 13 "corrections," "additions," and points contained in Respondent's Brief in Opposition ("Opp.") – lack merit, as do Respondent's characterization of the scope of the matter

before the Missouri Commission on Human Rights (Commission), and the import of the pending petition for writ of certiorari in *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1823).

1. Respondent's invocation of *res judicata* addresses neither the district court's lack of subject matter jurisdiction nor any of the other reasons this Court should grant the petition. Those frequent invocations (*e.g.*, Opp. at 1, 4, 5, 6, 8, and 10) demonstrate Respondent's determination to avoid responsibility to anyone but a single employee. Respondent cannot answer the jurisdiction question because *res judicata* does not in itself establish a federal question.

The Eighth Circuit – and, at one time, Respondent – understood that Respondent was required to find some federal question to permit the case to proceed in federal court. App. A-18. The court of appeals held that the requisite federal question resided in the Federal Arbitration Act, reasoning that the Act creates a federal right for employers with which the Commission would interfere. App. A-18. Thus, in arguing its position below, Respondent made only passing and implicit reference to the defense of *res judicata* (*see* Brief of Appellee, pp. 26, 28), relying instead on the position it now disavows: that it could invoke the Arbitration Act as the source of a federal question (*see* Opp. at 9). Perhaps Respondent failed to more fully elaborate on its *res judicata* theory because a full-blown *res judicata* analysis would have revealed the inapplicability of the defense against one not a party to the prior proceeding.[1]

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[1] Or perhaps Respondent gave its theory short shrift because it elected not to cross-appeal that portion of the district court's judgment permitting the remaining defendants to seek injunctive relief. App. A-24 — A-25. If the district

With regard to Respondent's prior reliance on the Arbitration Act to support its claim of jurisdiction, noticeably absent from Respondent's presentation to this Court is any discussion of *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), a case in which this Court specifically held that the Arbitration Act is not a jurisdictional statute. That Act, the Court held, creates no "independent federal question jurisdiction." *Id.* Respondent's decision to ignore that precedent is particularly striking in view of its heavy reliance on *Southland Corp. v. Keating*, 465 U.S. 1 (1984), to support its argument that the federal courts must have jurisdiction where a party invokes the Arbitration Act. Opp. at 7. To borrow Respondent's phraseology, what is "crystal clear" about *Southland* is that it takes a view opposite to that of Respondent: the Court reaffirmed the holding of *Moses H. Cone* that the Arbitration Act "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland*, 465 U.S. at 16 n.9, *citing Moses H. Cone*, 460 U.S. at 25 n.32.

In fact, what this Court reviewed in *Southland* was not even a federal court case; rather, it involved the parties to franchise contracts that contained arbitration clauses, and the franchisor's state court enforcement proceedings against its franchisees. *Id* at 3-4. Though the facts in *Southland* are not particularly relevant, the holding only reinforces the Commission's position.

2. In another tack away from the issue of federal question jurisdiction that this case presents, Respondent suggests Petitioners overlooked diversity as an independent basis for the federal court's jurisdiction. Opp. at 5-6. But Respondent sued only a state agency and, in their official

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court had applied *res judicata* (which it did not), it would also have barred injunctive relief.

capacities, state officials. Such defendants are not "citizens" for purposes of establishing diversity. *E.g., Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 533 (1st Cir. 1988) (and cases cited therein).

3. Respondent confuses the relief the Petitioners seek. The Petitioners always sought injunctive relief, as well as victim-specific remedies such as back pay and damages. That was true from the beginning of the underlying Missouri Commission on Human Rights proceeding: the initial complaint prayed for an order of injunctive relief, *i.e.*, for an order that Respondent "cease and desist [its] unlawful and discriminatory acts." Joint Appendix in the Eighth Circuit, App. 42. And after the case had been more fully developed, the Petitioners sought, and were granted, leave to file a second amended complaint.[2] The second amended complaint alleged that Respondent discriminated against Anthony Hoskins and other employees, causing them lost wages and other injuries. Among other things, the second amended complaint prayed for an order that Respondent "cease and desist [its] unlawful and discriminatory acts," and for the entry of such other orders as are "just and proper under the circumstances...." *See* Second Amended Complaint in file of Missouri Commission on Human Rights, *State ex rel. Nixon v. Merrill Lynch*, no. E-07/94-12670.

4. Finally, Respondent argues that *Waffle House* is not squarely on point and thus dismisses the importance of the EEOC's pending petition for writ of certiorari. Opp. at

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[2] A special hearing examiner granted the Commission's motion to file a second amended complaint, stating in an order filed October 25, 1999, that "said second amended complaint is deemed filed." *See* file of Missouri Commission on Human Rights, *State ex rel. Nixon v. Merrill Lynch*, no. E-07/94-12670.

10. Precisely. *Waffle House* is narrower than the instant case. As discussed in the Petition, this case presents an opportunity to fill in detail that the *Waffle House* case does not permit. Most important, *Waffle House* does not address the essential question posed here: the propriety of the use of cases such as *Ex Parte Young*, 209 U.S. 123 (1908), as a basis for permitting the federal courts to micro-manage the states' statutory enforcement efforts. *See* Opp. at 11-12. Certainly the mere invocation of *Ex Parte Young*, a case that provides a vehicle to prevent state actors from taking unconstitutional actions, does not alone establish the necessary federal question jurisdiction, any more than, for example, the mere invocation of "42 U.S.C. §1983."

CONCLUSION

For the reasons stated in this reply, coupled with those found in the petition, the Court should grant the petition for writ of certiorari, and either summarily reverse the court of appeals' holding that it had subject matter jurisdiction, or set this matter for briefing and argument, instead of or alongside *Waffle House*.

Respectfully submitted,

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